

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

## **FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE**

Petitioner Van Lee Brewer has filed a 28 U.S.C. § 2254 habeas application [Dkt. No. 3], a motion for leave to file his habeas corpus petition [Dkt. No. 6], and a motion to exceed the page limit [Dkt. No. 7]. For the reasons explained below, the Court should transfer the application to the United States Court of Appeals for the Fifth Circuit for appropriate action.

## Background

In 1989, Petitioner was tried by jury in the 291st Judicial District Court of Dallas County, Texas, in Cause No. F89-97479-IU and convicted of sexual assault on five charges of aggravated robbery. *See* Dkt. No. 3 at 2. He received a fifty-year sentence. *See id.*

Petitioner filed a previous Section 2254 petition challenging the same conviction and sentence, which was denied. *See Brewer v. Johnson*, No. 3:93-cv-1422-P (N.D. Tex.

March 29, 1996), *aff'd, Brewer v. Director*, No. 96-10449 (5th Cir. Aug. 12, 1997). His present Section 2254 petition contends that DNA testing shows that he is innocent and that the State used perjured testimony.

### **Legal Standards**

The Antiterrorism and Effective Death Penalty Act of 1996 limits the circumstances under which a state prisoner may file a successive application for federal habeas relief. *See ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996*, Pub. L. 104-132, 110 Stat. 1214 (1996). A petition is successive when it raises a claim that was or could have been raised in an earlier petition. *See Hardemon v. Quarterman*, 516 F.3d 272, 275 (5th Cir. 2008). A claim presented in a second or successive application under Section 2254 must be dismissed unless:

- (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
- (B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and  
(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2). That determination must be made by a three-judge panel of the Court of Appeals before Petitioner files his application in federal district court. *See id.* § 2244(b)(3). Insofar as the United States Court of Appeals for the Fifth Circuit has not

granted leave to file a successive habeas petition, this Court is without jurisdiction to consider Petitioner's allegations. *See 28 U.S.C. § 2244(b).*

### **Analysis**

The Court of Appeals has not issued an order authorizing this Court to consider this successive Section 2254 petition. Petitioner must obtain such an order before another application for post-conviction relief may be filed. Accordingly, this 28 U.S.C. § 2254 habeas application should be transferred to the United States Court of Appeals for the Fifth Circuit. *See Henderson v. Haro*, 282 F.3d 862, 864 (5th Cir. 2002); *see also In re Epps*, 127 F.3d 364, 365 (5th Cir. 1997) (adopting procedure to be used when a district court transfers to the Court of Appeals a successive Section 2254 motion from a state prisoner).

### **Recommendation**

Petitioner's application for writ of habeas corpus and motion for leave to file the petition should be transferred to the United States Court of Appeals for the Fifth Circuit for appropriate action. Petitioner's motion to exceed page limit should be dismissed for lack of jurisdiction, because the Fifth Circuit has not authorized a successive Section 2254 petition.

A copy of these findings, conclusions, and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendation must file specific written objections within

14 days after being served with a copy. *See 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b).*

In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions, and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: August 26, 2014



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DAVID L. HORAN  
UNITED STATES MAGISTRATE JUDGE